

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs September 1, 2009

STATE OF TENNESSEE v. DAVID LEE HEAKIN

Appeal from the Circuit Court for Hickman County
No. 07-5043 Jeffrey Bivins, Judge

No. M2008-01834-CCA-R3-CD - Filed February 16, 2010

A Hickman County jury convicted the Defendant, David Lee Heakin, of reckless endangerment, as a lesser included offense of attempted first degree murder, and aggravated assault. He was acquitted of especially aggravated kidnapping. The trial court sentenced him to concurrent terms of two years for felony reckless endangerment and five years for aggravated assault. In this direct appeal, the Defendant contends that the trial court committed the following errors: (1) excluding the victim's statement to her lawyer made in contemplation of a civil suit against the Defendant, as covered by the attorney-client privilege; (2) excluding, as extrinsic evidence, a recording of a message allegedly made by the victim threatening a witness; and (3) entering convictions for both reckless endangerment and aggravated assault because the elements for these offenses are "mutually exclusive." After a review of the record, we affirm the Defendant's conviction for aggravated assault. However, the Defendant's conviction for felony reckless endangerment must be modified to misdemeanor reckless endangerment. Thereafter, the Defendant's conviction for misdemeanor reckless endangerment must be merged into his conviction for aggravated assault, so as not to offend the Defendant's double jeopardy protections. Therefore, we remand the case to the trial court for entry of corrected judgments reflecting the merger. The Defendant's conviction and sentence for aggravated assault is affirmed.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Modified;
Remanded**

DAVID H. WELLES, J., delivered the opinion of the Court, in which ALAN E. GLENN and CAMILLE R. MCMULLEN, JJ., joined.

Kenneth K. Crites, Centerville, Tennessee, for the appellant, David Lee Heakin.

Robert E. Cooper, Jr., Attorney General and Reporter; Clarence E. Lutz, Assistant Attorney General; Ronald L. Davis, District Attorney General; and Michael J. Fahey, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

This case relates to the Defendant's assault of his former fiancé, Shannon Beasley (the victim) over a four-day period in March 2007. Thereafter, a Hickman County grand jury returned a three-count indictment against the Defendant, charging him with attempted first degree murder (Count 1), especially aggravated kidnapping (Count 2), and aggravated assault (Count 3). A jury trial was held.

The evidence in the light most favorable to the State established the following facts surrounding the assault of the victim. At trial, the victim testified that, after her divorce seven years earlier, she returned to Hickman County to live with her parents. She met the Defendant in November 2006, and the two began dating and later became engaged. The victim moved in with the Defendant, and she lived with him for approximately three months. She moved out in March 2007, when the Defendant became "overbearing and obsessive." The Defendant helped her pack, and she returned to live with her parents. After she left, the Defendant still telephoned her frequently.

About two weeks following the separation, on a Tuesday or Wednesday, the Defendant called her around lunchtime and told her that he had hurt his back falling down some stairs. She returned to his house to check on him, taking only her purse and some wine coolers with her. In the late evening hours, the victim was getting ready to leave when the Defendant started arguing with her because he did not want her to go. He took her keys and her purse. The victim could not recall clearly what happened next, but she remembered that the Defendant "just exploded" and began punching her repeatedly. The victim believed that, when she went to reach for her cell phone, the Defendant stomped her hand and threw the phone through the door.

She remembered being beaten with a broom handle, while begging the Defendant to stop. While the sequence of events was unclear to her, she could remember that, at one time, she was in the Defendant's truck when the Defendant slammed on the brakes, and she hit her head on the windshield. On another occasion, the Defendant dragged her to the creek near the house and held her head under water. She was wearing only men's underwear at this time. After the Defendant left her there, she crawled to a nearby cabin. Eventually, the Defendant dragged her back inside the house, dropping her to the ground along the way. She recalled that she looked for a telephone but that she could not find one, because all the

phones in the house had been broken or disabled. She also remembered that, during the several-day ordeal, a chair was thrown on top of her and something metal hit her head on each side. The victim remembered that her mother visited the house once during this period, but the victim told her mother that she was all right, so her mother left.

On Saturday morning, March 24, the police arrived at the residence at the behest of the victim's mother. Deputy Aaron Beasley of the Hickman County Sheriff's Office discovered the victim in a bedroom on the second floor. The house had been ransacked. The victim was alone, naked and lying on a bare mattress under a blanket. She stated that she could not move and faded in and out of consciousness while waiting on other emergency personnel to arrive. As Deputy Beasley assisted in carrying the victim to the ambulance, the victim stated, "If I leave, David will kill me." The victim was then transported to the hospital. According to the victim, she suffered the following injuries during the assault: her teeth went through her lip; her hair was pulled out; she received a laceration on her back which required fourteen stitches; multiple bruises; a rash; damage to her eye; and torn ligaments.

She acknowledged that she was released from the hospital the same day. The victim admitted that she had a problem with alcohol but denied any problem with drugs. The victim also confirmed that, twelve days after the incident, she and her mother went to a lawyer's office in contemplation of filing a civil suit against the Defendant.

Shortly after the victim was placed in the ambulance, the Defendant returned to the residence. The Defendant said, "I'm here to face the music." Deputy Beasley did not observe any injuries on the Defendant, other than that his "knuckles were skint." According to Deputy Beasley, the Defendant's appearance was disheveled, he was unsteady on his feet, his speech was slurred, and he smelled of alcohol; he appeared to be intoxicated. The Defendant was placed in the back of Deputy Beasley's patrol car. Detective Kenneth Smith with the Hickman County Sheriff's Department read the Defendant his Miranda¹ rights prior to asking the Defendant any questions. According to Det. Smith, the Defendant repeatedly said that "she cheated on me." Deputy Beasley then transported the Defendant to the jail. As they started out the driveway, the Defendant said that he "just let jealousy get the best" of him and that he drug the victim to the creek "and washed the stink of man off of her."

The victim's mother, Barrie Bale, also testified. She stated that, when her daughter left her home that Tuesday afternoon, she expected her to return home. Instead, the Defendant came to her house on Wednesday to retrieve her daughter's makeup and medication. The victim still did not return home and, on Thursday, the Defendant called and

¹ See Miranda v. Arizona, 384 U.S. 436 (1966).

was “livid.” He told her that he had “shook the hell out of” the victim and thrown her in a nearby creek. The victim’s mother phoned the police, who went to the residence but found no one home. The victim’s mother went to the Defendant’s house on Friday morning and began blowing her horn. The Defendant and the victim came to an upstairs window, and the victim told her she was okay and to go home. Not believing either the victim or the Defendant that the victim was okay, the victim’s mother again called the police for assistance on Saturday morning.

Allison Frye, the victim’s best friend, stated that she often conversed with the Defendant and the victim via the Defendant’s speaker phone. After the Defendant and the victim stopped dating, the Defendant telephoned Frye, expressing anger toward the victim for cheating on him. According to Frye, the Defendant phoned her on Friday, March 23, and she heard someone in the background saying, “Let me up, let me up.” The Defendant admitted that the victim was at his house, and he told Frye that he was going to kill the victim. Frye testified that the Defendant then threatened to kill Frye’s husband and another man from the victim’s past.

The Defendant testified on his own behalf, claiming that the victim was extremely intoxicated over the four-day period and denying that he confined or beat the victim in any way. The Defendant stated that the victim had previously indicated to him that she had been with other people. While the two were heavily intoxicated on that Friday evening, the victim spat in his face and slapped him, calling him “stupid.” According to the Defendant, he snapped and pushed the victim. She “went in the air,” and her head hit a table.

The Defendant also presented Candice Beasley as a witness; Mrs. Beasley was the victim’s ex-husband’s new wife. Mrs. Beasley testified that the victim called her and left a message. In the message, the victim threatened to reveal a past sexual encounter between the victim and Mrs. Beasley’s husband if Mrs. Beasley testified against the victim in the Defendant’s trial. According to Mrs. Beasley, the victim admitted to her that, on several occasions, she had put Xanax and other medications in the Defendant’s drinks. The victim “made it seem like it was during this ordeal.” The victim also relayed to Mrs. Beasley that she planned on marrying the Defendant and then intended to “take half of everything he had.” Mrs. Beasley also said that the victim stated that she would drop the charges against the Defendant if he would give her some money and/or property.

Following the conclusion of the proof, the jury found the Defendant guilty of reckless endangerment, as a lesser included offense of attempted first degree murder, not guilty of especially aggravated kidnapping, and guilty of aggravated assault. The trial court sentenced the Defendant, a Range I, standard offender, to two years for the reckless endangerment

conviction and five years for the aggravated assault conviction; these sentences were ordered to be served concurrently. This appeal followed.

Analysis

I. Attorney-Client Privilege

First, the Defendant argues that the trial court erred in excluding the victim's statement made to her private counsel. The victim and her mother went to an attorney's office on April 4, twelve days after the incident, in contemplation of filing a civil suit against the Defendant. The victim's mother was present for the recorded interview, and the attorney asked questions of both the victim and her mother.

Defense counsel wished to cross-examine the victim and her mother using the transcript from the interview, arguing that the victim waived the attorney-client privilege "the minute he provided it to [the State]." However, the trial court ruled that the discussion was protected by the attorney-client privilege and that the privilege had not been waived:

Well, the attorney-client privilege is a privilege of the client, and only the client can waive the privilege. So I'm not going to allow you . . . to ask questions regarding something that's not a matter of public record. If it's a transcript—if you're asking from a transcript of a private conversation which she had with her lawyer, I think that's still subject to—they may've turned it over because of the state investigation, but it's still the client's privilege to waive, and if she hasn't waived that privilege, I think it's still subject to client privilege.

. . . .

. . . But the court's ruling is based upon the fact that the attorney-client privilege is a privilege that extends to the client, and the client must voluntarily and intentionally waive that right, and in the court's mind there has been insufficient proof in the record upon which the court can find that [the victim] voluntarily and intentionally waived her right to invoke the attorney-client privilege in the matter.

The trial court operated under the assumption that, if the victim was asked about the interview, she would have asserted the privilege; however, she was never directly asked. Moreover, the trial court foreclosed the possibility of such an inquiry, stating "wouldn't that be enough instead of just asking her questions about it, . . . just put the document into evidence" Defense counsel acquiesced to this suggestion, making only an offer of proof.

The document was introduced into the record under seal. Defense counsel asserted that the document contained a number of contradictory statements and “would have been fertile ground for impeachment of the witness, and that excluding that really impinges on [the Defendant’s] right to effective assistance of counsel and, also, his right to cross examination of the witness.” The Assistant District Attorney then clarified,

I was handed that by her and then was faced with the opportunity of I had a written statement based on what she had told another person, [her private counsel]. I read through it, I saw nothing exculpatory or anything, but I know exculpatory evidence is also often in the eyes of the beholder, so just out of a sheer abundance of caution, I . . . let [defense counsel] see it because it was a written statement, or at least a typed-out version of a recorded statement that she had made.

Subsequently in the colloquy, defense counsel stated, “I was trying to think . . . of why [the attorney] provided that, if she had waived it to him or what the reasoning was behind that.”

By statute and common law, Tennessee recognizes an evidentiary privilege which protects the confidentiality of attorney-client communications. Tennessee Code Annotated section 23-3-105 provides as follows:

Attorney-client privilege—No attorney, solicitor or counselor shall be permitted, in giving testimony against a client, or person who consulted the attorney, solicitor or counselor professionally, to disclose any communication made to the attorney, solicitor or counselor as such by such person, during the pendency of the suit, before or afterwards, to the person’s injury.

The relationship between attorney and client is a mainstay of our system of justice, and the purpose of the privilege is to protect that relationship by fostering the free flow of communication in an atmosphere of mutual trust and confidentiality. See Bryan v. State, 848 S.W.2d 72, 79 (Tenn. Crim. App. 1992). The object of the rule is to protect the professional communications between attorney and client “by profound secrecy.” Id. (quoting from McMannus v. State, 39 Tenn. 213, 215-16 (1858)).

However, the privilege is not absolute. Not only must the communication occur within the bounds of the attorney-client relationship, it must be made with the intent that the communication be kept confidential. Bryan, 848 S.W.2d at 80. The privilege is designed to protect the client, and because it belongs to the client, the client may waive the privilege. Smith County Educ. Assoc. v. Anderson, 676 S.W.2d 328, 333 (Tenn. 1984). The client waives the right to keep attorney-client communications secret when he or she divulges the

communications that the client later seeks to protect. State v. Burford, 216 S.W.3d 323, 326 (Tenn. 2007); see also Taylor v. State, 814 S.W.2d 374, 377 (Tenn. Crim. App. 1991).

The issue was not sufficiently developed at the trial court level for us to determine if the victim waived her attorney-client privilege. The trial court found that, if the victim was asked, she would have asserted the attorney-client privilege; however, this ruling failed to take into account that the document had already been divulged to the State, a third party. From the above-quoted portions of the record, it is unclear who provided the statement to the Assistant District Attorney, whether it was the victim herself or her attorney, and whether it was disclosed pursuant to a request or upon the individual's own initiative. Parsing the language used by the Assistant District Attorney, the recipient of the statement and, seemingly, the person in the best position to know who provided the statement, it was the victim who proffered the statement. The victim may very well have waived her right to invoke the privilege, which would have allowed the Defendant to use the document for cross-examination purposes.

That said, we are further hampered by the Defendant's failure to include a transcript of the hearing on the motion for new trial in the record. The order contained in the record is simply a minute entry providing that the motion was denied without enumerating any reasons.² Thus, we are unable to review the trial court's reasons for the denial of the motion for new trial. As with most other evidentiary issues, decisions regarding the application of the attorney-client privilege address themselves to the trial court's discretion. Boyd v. Comdata Network, Inc., 88 S.W.3d 203, 211 (Tenn. Ct. App. 2002). Therefore, a trial court's decision in this regard cannot be disturbed on appeal unless the court has applied an incorrect legal standard, reached a decision that is illogical, based its decision on a clearly erroneous assessment of the evidence, or employed reasoning that causes an injustice to the complaining party. Id. at 211-12. Because we cannot make a determinative ruling on the issue based upon the record before us, and because it is the Defendant's responsibility to prepare an adequate record on appeal, including a transcript of the motion for new trial, we must presume that no abuse of discretion occurred in the trial court's decision that the statement was protected by the attorney-client privilege. See Tenn. R. App. P. 24 (providing that it is the appellant's duty to prepare a fair, accurate, and complete record on appeal to enable this court to conduct a meaningful review).

² The record as submitted also did not contain an order denying the motion for new trial. The State argued that we should dismiss the case for lack of jurisdiction. However, because Rule 13(b) of the Rules of Appellate Procedure requires us to determine whether we have jurisdiction in every case on appeal, and because it did appear from the record that the trial court denied the motion, we ordered the trial court to supplement the record. A copy of the minute entry is sufficient to confer jurisdiction upon this Court. See State v. Byington, 284 S.W.3d 220, 225 (Tenn. 2009).

Moreover, based on our review of the interview transcript, we conclude that any error in failing to permit cross-examination based upon the statement's contents was harmless. The Defendant was allowed to attack the victim's credibility in a variety of ways: (1) inquiring about the civil law suit on cross-examination of both the victim and the victim's mother; (2) entering a lien filed by the victim against the Defendant's property; and (3) witness testimony that the victim orchestrated these events in an effort to obtain monetary gain.

The Defendant also makes the broad allegation that exclusion of the statement violated his Sixth Amendment rights to the effective assistance of counsel and to present exculpatory evidence, relying on Chambers v. Mississippi, 410 U.S. 284, 298-301 (1975), and to confront the witnesses against him, citing to Crawford v. Washington, 541 U.S. 36 (2004). However, where a defendant has the opportunity at trial to confront the declarant of a statement used against him, there can be no confrontation problem. Crawford, 541 U.S. at 59 n. 9 (citing California v. Green, 399 U.S. 149, 162 (1970)). The standards set forth in Crawford are not applicable here because the out-of-court statement was not used against the Defendant at trial. Most importantly, the victim and her mother were both present at trial and testified. As noted above, the Defendant was able to attack the credibility of the victim in a number of ways, in effect covering most of the matters contained in the statement. The statement was not critical to his defense, but it was only corroborative of evidence already before the jury. The Defendant was not denied the assistance of counsel or the opportunity to present a defense; in fact, the defense as presented resulted in a lesser conviction and an acquittal under two counts of the indictment. The Defendant is not entitled to relief on this issue.

II. Admissibility of Tape Recording

Next, the Defendant challenges the exclusion of a tape recorded telephone call, wherein the victim attempted to intimidate a witness into not testifying. To support this claim the Defendant argues that the trial court erred by concluding that the tape constituted inadmissible extrinsic evidence and that the tape should have been admitted under Rule 616 of the Tennessee Rules of Evidence. The State argues that the trial court was correct in its determination that the evidence was inadmissible because the substance of the recording "had already been denied by the victim and recounted by the [D]efendant's witness." We again note that the Defendant has failed to include the transcript of the motion for new trial hearing in the record before this court. It is the duty of the appealing party to prepare an adequate record for appellate review. Tenn. R. App. P. 24(b).

The victim was asked on cross-examination if she had ever threatened her ex-husband or Candice Beasley in any way to keep them from testifying, and the victim responded in the negative. The defense called Mrs. Beasley as a witness and asked her if the victim had ever

left her any threatening messages, to which Mrs. Beasley replied that the victim had left such a message on her cellular telephone. Mrs. Beasley interpreted the message as “black mail” by the victim: “she was going to tell me a bunch of stuff that had went on between her and my husband if he didn’t get her off my back (sic).” Defense counsel then sought to introduce a recording of that message, and the trial court denied that request stating that the tape was inadmissible extrinsic evidence. An offer of proof was made, and a voice on the tape threatens, “So you better get the bitch off my back or she’s going to find out about the shit.”

Tennessee Rules of Evidence state that the “credibility of a witness may be attacked by any party. . . .” Tenn. R. Evid. 607. Thus, a prior inconsistent statement may be used to impeach the credibility of a witness who denies having made the prior statement. See State v. Jones, 15 S.W.3d 880, 891 (Tenn. Crim. App. 1999). Additionally, Tennessee Rule of Evidence 613 governs the use of extrinsic evidence of a prior inconsistent statement of a witness, and mandates that such extrinsic evidence is inadmissible until (1) the witness is asked whether he or she made the prior inconsistent statement; and (2) the witness denies having made the prior inconsistent statement. See also State v. Martin, 964 S.W.2d 564, 566-67 (Tenn. 1998).

In this case, the record demonstrates that the victim was asked if she had ever threatened her ex-husband or Mrs. Beasley. The victim denied having made such threats. Accordingly, the trial court did not err by allowing the defense to call Mrs. Beasley to testify about the victim’s threats, as evidence of a prior inconsistent statement made by the victim. We note that this is extrinsic evidence, as contemplated by Rule 613, in the form of rebuttal witness testimony for the purpose of attacking the credibility of the victim.³

More to the point, defense counsel sought to play the tape of the threatening message to emphatically illuminate the discrepancy in the victim’s testimony. Rule 403 of the Tennessee Rules of Evidence permits the exclusion of relevant evidence if its probative value is substantially outweighed by the danger of “undue delay, waste of time, or needless presentation of cumulative evidence.” We cannot conclude that the trial judge abused his discretion by precluding the defense from playing a message the victim left on the witness’s cellular telephone when the discrepancy in the victim’s testimony had already come before the jury. This issue is without merit.

III. Mutually Exclusive Convictions

As his final assignment of error, the Defendant contends that his dual convictions for reckless endangerment (Count 1) and aggravated assault (Count 3) cannot stand because

³ Rule 616 is inapplicable here, as the tape was not being offered for the purpose of exposing Mrs. Beasley’s motivation in testifying. See Tenn. R. Evid. 616.

“[t]he elements of intent required [for reckless endangerment] are similar to aggravated assault.” He phrases the issue as follows: “Whether the guilty verdict was mutually exclusive as to reckless endangerment and aggravated assault?” While seemingly a double jeopardy argument, the Defendant states that it was plain error for the trial court to charge reckless endangerment as a lesser included offense of attempted first degree murder.

Misdemeanor reckless endangerment occurs when a person “recklessly engages in conduct that places or may place another person in imminent danger of death or serious bodily injury.” Tenn. Code Ann. § 39-13-103. It becomes a Class E felony when committed with a deadly weapon. Tenn. Code Ann. § 39-13-103(b). Felony reckless endangerment is not a lesser included of attempted first degree murder, but misdemeanor reckless endangerment is. See State v. Rush, 50 S.W.3d 424, 431-32 (Tenn. 2001).

As the State correctly points out, while the judgment forms reflect a conviction for felony reckless endangerment, the jury charge reflects that a charge of misdemeanor reckless endangerment was given. The trial judge, in discussing the prospective jury charge, stated, “I have narrowed down some of the alternatives on the charges, themselves, like the ones talking about deadly weapon, I took that out because this is not a deadly weapon case” Nonetheless, the Defendant received a felony sentence on the reckless endangerment conviction. The State asks us to remand for resentencing and for modification of the judgment form to reflect a conviction for misdemeanor reckless endangerment.

However, the State’s argument fails to acknowledge the double jeopardy concerns ostensibly espoused by the Defendant. Aggravated assault as charged in the indictment occurs when a person “[i]ntentionally or knowingly commits an assault as defined in § 39-13-101 and causes serious bodily injury.” Tenn. Code Ann. § 39-13-102(a)(1)(A). The trial court instructed the jury that a person commits assault who intentionally, knowingly, or recklessly caused bodily injury to another. See Tenn. Code Ann. § 39-13-101(a)(1). In this case, the Defendant’s convictions arose out of a single attack involving one victim. Therefore, convictions for both offenses violate double jeopardy protections, and the misdemeanor offense must be merged into the felony offense. See State v. Raymond Deshun Ross, No. W2006-01167-CCA-R3-CD, 2007 WL 3254436, at *10 (Tenn. Crim. App., Nov. 2, 2007) (citing Blockburger v. United States, 284 U.S. 299, 304 (1932); State v. Denton, 938 S.W.2d 373, 378 (Tenn. 1996); State v. Adams, 973 S.W.2d 224, 229 (Tenn. Crim. App. 1997)), perm. to appeal denied, (Tenn. June 30, 2008). Thus, while we remand for modification of the judgment form to reflect a misdemeanor conviction under Count 1, ultimately, we must conclude that the Defendant’s conviction for misdemeanor reckless endangerment in Count 1 must be merged into his conviction for aggravated assault in Count 3.

Conclusion

Based upon the record and the parties' briefs, we affirm the Defendant's conviction for aggravated assault under Count 3 of the indictment. However, we must remand for modification of the judgment form under Count 1 to reflect a conviction for misdemeanor reckless endangerment. We further conclude that the misdemeanor reckless endangerment conviction must merge into the aggravated assault conviction. Therefore, we also remand the case to the trial court for entry of a misdemeanor reckless endangerment judgment reflecting that the conviction merges into the aggravated assault conviction.

DAVID H. WELLES, JUDGE